

Federal Housing Enterprise Oversight

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(ii) Any conduct that causes or is likely to cause a loss to the Enterprise.

(3) *Third tier CMPs.* The Director may issue a notice of charges to an Enterprise to impose money penalties of up to \$1,000,000 (adjusted for inflation as described in §1780.80) for each day that the Enterprise engages in a violation or conduct described in paragraphs (c)(2)(i) and (ii) of this section, or to an executive officer or director of an Enterprise to impose money penalties of up to \$100,000 (adjusted for inflation as described in §1780.80) for each day such person or persons engages in such violation or conduct described in paragraphs (c)(2)(i) and (ii) of this section, if the Director finds that the violation or conduct was knowing and caused or is likely to cause a substantial loss to the Enterprise.

(4) *Amount of CMPs.* In determining the amount of a civil money penalty within the range of penalties described in paragraphs (c)(1) through (3) of this section, the Director may fashion sanctions in any such amount as deemed to be appropriate taking into consideration such factors as:

- (i) The gravity of the violation or conduct;
- (ii) Any loss or risk of loss to the Enterprise;
- (iii) Any benefits received;
- (iv) Any attempts at concealment;
- (v) Any history of prior violations or conduct;
- (vi) Any related or unrelated previous supervisory actions;
- (vii) Any injury to the public;
- (viii) Deterrence of future violations or conduct;
- (ix) The effect of the penalty on the safety and soundness of the Enterprise;
- (x) Any circumstances of hardship upon an executive officer or director;
- (xi) Promptness and effectiveness of any efforts to ameliorate the consequences of the violations or conduct; and
- (xii) Candor and cooperation after the fact.

(d) *Coordination with other supervisory actions.* In addition to cease and desist and/or civil money penalty proceedings under this part, the 1992 Act grants the Director other authority to take supervisory action, including requiring mandatory and discretionary supervisory

actions against an Enterprise that fails to remain adequately capitalized; appointment of a conservator for an Enterprise; entering into a written agreement the violation of which is actionable through proceedings under this part, or any other formal or informal agreement with an Enterprise as may be deemed by the Director to be appropriate. Under the 1992 Act, the selection of the form of supervisory action is within the Director's discretion, and the selection of one form of action or a combination of actions does not foreclose the Director from pursuing any other supervisory action.

(e) *Proceedings against affiliates.* Under subtitle C of the 1992 Act, the Director may institute proceedings as described under this part against an affiliate of an Enterprise as well as an executive officer or director of such affiliate. An entity is affiliated with an Enterprise if the entity controls the Enterprise, is controlled by the Enterprise, or is under common control with the Enterprise. For purposes of this part, control means the ability to exercise a controlling influence over the management and policies of the entity or Enterprise, whether it be by ownership of or the power to vote a concentration of any class of voting securities, the ability to elect or appoint members of the board of directors or officers of the entity, or otherwise.

(f) *Public nature of proceedings.* As described in §1780.6 of this part, all hearings shall be open to the public unless the Director in his discretion determines to the contrary based on public interest. The Director shall also make final orders available to the public, as well as modifications to or terminations thereof, except that the Director may determine in writing to delay public disclosure of such final orders for a reasonable time if immediate disclosure would seriously threaten the financial health or security of the Enterprise.

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§ 1780.2 Rules of construction.

For purposes of this part—

(a) Any term in the singular includes the plural and the plural includes the singular, if such use would be appropriate;

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(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate; and

(c) Unless the context requires otherwise, a party's representative of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 1780.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary—

(a) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation;

(b) *Decisional employee* means any member of the Director's or the presiding officer's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the presiding officer, respectively, in preparing orders, recommended decisions, decisions and other documents under this subpart.

(c) *Director* means the Director of OFHEO.

(d) *Enterprise* means the Federal National Mortgage Association and any affiliate thereof and the Federal Home Loan Mortgage Corporation and any affiliate thereof.

(e) *OFHEO* means the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development.

(f) *Party* means OFHEO and any person named as a party in any notice.

(g) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization.

(h) *Presiding officer* means an administrative law judge or any other person appointed by the Director under applicable law to conduct a hearing.

(i) *Representative of record* means an individual who is authorized to represent a person or is representing himself and who has filed a notice of appearance in accordance with § 1780.72.

(j) *Respondent* means any party other than OFHEO.

(k) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, par-

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ticipating in, counseling, or aiding or abetting a violation.

(1) The *1992 Act* is title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act) (12 U.S.C. 4501-4641).

§ 1780.4 Authority of the Director.

The Director may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of any act that could be done or ordered by the presiding officer.

§ 1780.5 Authority of the presiding officer.

(a) *General rule.* All proceedings governed by this subpart shall be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The presiding officer shall have complete charge of the hearing, conduct a fair and impartial hearing, avoid unnecessary delay and assure that a record of the proceeding is made.

(b) *Powers.* The presiding officer shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section and 5 U.S.C. 556(c). The presiding officer is authorized to—

(1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas, subpoenas *duces tecum*, and protective orders, as authorized by this part, and to revoke, quash, or modify such subpoenas;

(6) Take and preserve testimony under oath;

(7) Rule on motions and other procedural matters appropriate in an adjudicatory proceeding, except that only the Director shall have the power to grant any motion to dismiss the proceeding or make a final determination of the merits of the proceeding;